IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and ANNA HALECKI, Administratrix of the Estate of Walter Joseph Halecki, deceased,

Respondent.

BRIEF FOR RESPONDENT

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Counter-Statement of Questions Presented

1. Whether a state, in enacting a Wrongful Death Act, may refer the standards of liability to the standards to be applied if the deceased had lived which, in the case of an accident on navigable waters of the United States, would be the general maritime law?

2. Whether the words "wrongful act, neglect or default" as used in the New Jersey Wrongful Death Act include an action based on unseaworthiness?

3. Whether the New Jersey Wrongful Death Act, which does not specify in the statute what defenses, if any, are available under its terms but uses a referral test for liability thereunder, incorporates the Maritime Law Rule of

comparative negligence where such Rule would have been applied to an action by the deceased if he had lived?

4. Whether or not an electrician was entitled to a seaworthy vessel, where he was doing maintenance work on navigable waters in a vessel with a captain and crew on board who had participated in such work and the work was within the range of work traditionally performed by seamen with qualifications as electricians?

Counter-Statement of Facts

On or about September 24, 1951 the petitioners contracted with Rodermond Industries, Inc. of Jersey City, New Jersey to have certain work done on the Pilot Boat "New Jersey" (P89a).

The list of items for work to be done was admitted in evidence as Exhibit 5 and also Exhibit 6 (R. 73). It provided in part (R. 146):

> *"Crew to remove and replace* the 8 cylinder heads for the port and stbd generators.
>
> Contractor to remove the eight (8) heads to the ship, disassemble same, grind in the valves, thoroughly clean out the head, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.
>
> *Spray clean* with carbon tetrachloride the armature and field windings to *remove all traces of dirt and film.* Close up and prove in good order." (Italics ours.)

Mr. Doidge the foreman for the employer of the deceased, testified that with reference to the above quoted item he had consulted with the chief engineer on the boat (R. 73). They agreed that the carbon tetrachloride work which had been specified in the contract would be done on Saturday, September 29, 1951 (R. 74). He also testified (R. 74):

"Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time? A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor."

The captain of the defendant's vessel was in court but he was not called upon to testify (R. 137). The plaintiff had read parts of the testimony on deposition that Captain Haley had given during the presentation of the plaintiff's case (R. 121-130). He had testified that he was the captain of the New Jersey on September 29, 1951 (R. 121). On that date the vessel was located at Rodermond Industries in Jersey City for "the annual overhaul" (R. 122). Captain Haley testified among other things (R. 123):

"Q. When you brought it there, was it brought by you and the officers and your complete crew? A. That is correct, sir, and the Marine Superintendent was aboard, too.

Q. When you say the marine superintendent, the marine superintendent of what company? A. Of our organization."

* * * * *

"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City? A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel."

* * * * * *

"Q. Just tell me what you did in reference to the vessel. A. We were moored in Rodermond Industries, and I was on board every day during the working hours."

* * * * *

"Q. And what were the work hours? A. From 7:30 until anywhere up to 5, 6 or 7 o'clock at night.

Q. And that was every day while it was at the Rodermond Industries pier? A. With the exception of week-ends, naturally.

Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel? A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.

Q. Who would do that? A. That would be the deck department.

Q. You mean the deck department of the vessel? A. Of the vessel.

Q. That has nothing to do with Rodermond Industries? A. No, sir."

* * * * *

"Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection? A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

Q. And the engine department? A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

Q. I will also ask you to go into the engine department, officers and crew of the engine department. A. *We had the full complement of engineers and engine room crew aboard.*

Q. During that period of time? A. That is correct.

Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in

Rodermond Industries during that period of time? A. *They were maintaining the engines and any other specific work that we had to take care of.*

Q. Were they also present during the night hours, the engine department? A. In some cases you would have men sleeping aboard the vessel at night.

Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours? A. As a standby or as a watch? What do you mean by that?

Q. Anyway at all. A. Well, *at night*, yes. I will say that *there was somebody that represented the engine department aboard the vessel on most of the occasions.*"

He testified (R. 126):

"Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work, what did you have to do with reference to the vessel while that repairs work was going on? A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries."

He testified (R. 128):

"Q. Then *during this entire time* while Rodermond Industries were doing their work, their repair work, *you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel?* A. *That is true, yes sir.*

Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall? A. If it was necessary they would work on a Saturday or a Sunday.

Q. Did your deck crew work on September 29, 1951, which was a Saturday? A. I had one man there.

Q. Who did you have there? A. Walter Thompson.

Q. What was his position? A. He was to maintain a watch."

He testified (R. 129):

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction? A. Mine and the marine superintendent.

Q. *And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected?* A. *Well, naturally.*"

On cross-examination by his own attorney, he stated (R. 130):

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.

Q. Just briefly what did that consist of? A. That consisted of deck and engine work.

Q. Repairs and overhaul? A. Repair and overhauls, yes.

Q. Was that work done under your orders? A. No sir.

Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. *Under the orders of the marine superintendent.*

Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct." (Italics ours.)

Not only did the defendant fail to call the Captain of the vessel as a witness, but it failed to call the Chief Engineer of the vessel either, although he was still employed by them (R. 138). Nor did the defendant call its Marine Superintendent to testify although he was still employed by them (R. 139). In fact it didn't call any wit-

ness except Walter C. Thompson, the man who was on watch and its medical and engineering experts who did not have direct knowledge of the situation.

The deceased was 40 years old at the time of his death (R. 68). He had a wife and three infant children (R. 68). He was an electrician employed by the K & S Electrical Company (R. 69). In September of 1951 he worked under Donald Doidge who was a foreman (R. 71). The deceased and Doidge brought a blower belonging to Rodermond Industries on board the vessel on Friday for use on Saturday (R. 81). It was placed in position about 7 or 8 feet above the engine room floor and tied to a rail (R. 82). The Chief Engineer of the vessel had been present on Friday when Doidge made preparations and put the blower in position. (R. 76; R. 82).

On Friday Doidge had sprained his wrist (R. 93). Consequently on Saturday he found that he couldn't hold a spray gun and press the trigger on it because of the condition of his wrist. The deceased took over the spraying and Doidge just helped him "move the stuff around" (R. 93). Doidge did spray for two or three minutes before he gave up (R. 93). Doidge went down into the engine room while the deceased sprayed but later on he didn't go down every time with the deceased (R. 94). The deceased would spray for 15 or 20 minutes and would come out of the engine room. Then he'd repeat the procedure (R. 94). Mr. Doidge testified (R. 94):

> "Q. During the time that he was spraying in the engine room, you stayed on top of the deck? A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room."

Mr. Doidge and the deceased started to work about 8:30 a. m. on Saturday morning (R. 92). They started spraying about 8:45 or 9:00 a. m. (R. 92). They stopped for lunch at noon for about half an hour and then they resumed work until about 3:00 or 3:30 p. m. (R. 94). They both left the vessel. The deceased complained of a "peculiar taste in his mouth" (R. 95). The defendant's crew member who had been on watch testified that "at the end of the day one of the fellows just said he wasn't feeling well" (R. 136).

Both Doidge and the deceased used three gas masks supplied by K & S Electric Co. (R. 91). They were regular Army surplus gas masks (R. 91). Doidge checked the gas masks before they used them (R. 99). He stated that whenever he saw the deceased working below he wore a mask (R. 101). Mr. Doidge also testified on cross-examination that the gas masks were not defective because the Police Department had checked the masks after the accident and he received a report from them (R. 105; R. 106).

The cause of death of the deceased was admitted. During the cross-examination of defendant's medical expert, the trial court asked (R. 142):

> "The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?
>
> The Witness: Yes, sir.
>
> The Court: I think everybody is in agreement on that. Is there any question about that?
>
> Mr. Mahoney: The defendant does not take issue with that, your Honor."

The great danger involved in the use of carbon tetrachloride in a confined place without proper ventilation was not disputed (R. 74; R. 97; R. 104; R. 108; R. 112; R. 143).

In petitioner's brief it is stated that "the decedent drank excessively" (P. br. 58). This statement is not accurate.

Mrs. Halecki denied her husband was a drunkard (Transcript P30). Mr. Doidge testified (R. 95):

> "Q. How was he with reference to being sober? Was he sober or not on the job? A. I never seen him take a drink. Of course he was like any man, he would like to take a drink once in a while, like any man, but in the approximate six years I knew him I never saw him under the influence of liquor or anything else.
> Q. Was he sober on the job? A. Very, very."

The defendant's own expert had conceded on cross-examination the weakness of the assumption defendant asserts (R. 142):

> "Q. And from the autopsy findings as you examined them was there any evidence of any alcoholism? A. (No response.)
> Q. Is there anything like that in the report? A. No, there isn't anything in the report that mentions alcoholism. There is no reason why the report would mention that unless it had a positive finding to that effect, but there are many effects of alcohol that are not evident in any autopsy report."
>
> * * * * *
>
> "Q. With respect to alcoholism? A. Yes, I would not insist on that interpretation, not having seen the liver."

Dr. Robert P. Gaines was called upon to testify for plaintiff. He had a Ph.D. in chemistry and was a biochemist with specialty in toxicology and public safety (R. 108). He testified that carbon tetrachloride is a member of the methane series in organic chemistry; that it had a specific gravity of 1.54 which means it is heavier than water; that it had a boiling point of 77 degrees Centigrade which meant that it was "rather volatile" (R. 109). Carbon tetrachloride is about 5 times heavier than air (R. 115).

He stated that at one time it was used as a medicine to eliminate worms but this was discontinued when it was discovered that this was a "toxic substance." It then became popular in connection with fire extinguishers because it was a non-conductor of electricity and could be used where electrical devices were involved. However it was found that these fire extinguishers when use in confined places caused poisonings and warning labels were subsequently affixed to them (R. 109). It was discovered that carbon tetrachloride was an ideal, economical, and efficient solvent where grease was involved and it came into more general use. Then it was discovered that employees in industries where the chemical was in wide use began to develop complaints. Studies were then made by public health authorities about 20 years ago and it was found that the chemical could be used if "adequate ventilation was provided" (R. 111). A concentration of 50 to 100 parts per million of carbon tetrachloride was considered safe (R. 111). Dr. Gaines also developed in his testimony the toxicological process by which the chemical affected the human body (R. 112). He testified that exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration would be "obviously harmful and deleterious" (R. 112). The concentration stated by the expert represents weight per unit volume and reflects the concentration of strength (R. 113).

Dr. Gaines testified that in view of the fact that carbon tetrachloride is about five times heavier than air it would sink to the bottom of the engine room and have the greatest concentration there (R. 115). The blowers would merely act to agitate or stir up the air in the engine room rather than replace it or remove it (R. 115). Proper ventilation would require ventilating ducts at floor level (R. 117).

Doidge testified that the engine room was approximately 40 feet long, 30 feet wide and about 18 feet high (R. 5).

He stated that they had used 8 gallons of carbon tetrachloride (R. 6). Dr. Gaines computed on the basis of these dimensions and without considering the displacement by machinery in the room that this involved 21,600 cubic feet of air (R. 22). He testified that temperature variations except where the freezing point is reached would make very little difference in volatization (R. 23). Taking a temperature of 25 degrees Centigrade as an average temperature, Dr. Gaines concluded that in a space 40 by 30 by 18 feet, eight gallons of carbon tetrachloride sprayed in six hours would produce a concentration of 20,000 parts per million (R. 23). There was machinery in this room (R. 140). This, as a matter of physical fact, would increase the concentration and the danger. This would produce at least 200 times the allowable safe concentration (R. 24). Dr. Gaines testified (R. 31):

"The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?

The Witness: And the amount of material present.

The Court: When you say the amount of material present, I don't follow that.

The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.

The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment."

However he also testified (R. 119):

"Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation. A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hypothetical state of facts? A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A. If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instru-

mental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. Do I answer the question, sir?"

The defendant's expert engineer on cross-examination confirmed Dr. Gaines's opinion (R. 143):

"Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room? A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaur? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing devide to stir that air up and permit it to circulate out with the rest of the exhausted air."

Judge Weinfeld fully and fairly set forth all the issues in his charge to the jury. The jury returned a verdict for $62,500 for the pecuniary loss to the widow and dependent children and for $2500 for conscious pain and suffering of the decedent (R. 64). Defendant moved to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial. All motions were denied (R. 65).

Judge Learned Hand, writing the majority opinion, affirmed the judgment of the District Court. *Halecki* v. *United New York and New Jersey S. H.P. Ass'n,* 251 F. 2d 708 (2 Cir. 1958). After reviewing the evidence he stated that there was sufficient evidence to support a finding of negligence (R. 150). Apparently Judge Lombard, who dissented, did not disagree with this part of the opinion for he would have granted a new trial on the issue of negligence (R. 160). Referring to the case of *Skovgaard* v. *The Tungus,* 252 F. 2d 14 (3 Cir. 1957) the court held that the words of the New Jersey Wrongful Death Act included by definition an action based on a breach of the warranty of seaworthiness (R. 152). Judge Learned Hand stated as to contributory negligence (R. 153):

> "* * *. Although, as we have said, we are not dealing with 'federal maritime law,' we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights 'rooted in federal maritime law' as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. * * *. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

This court has granted certiorari (R. 172).

Summary of Argument

The deceased, if he had lived, would have had his rights and duties with relation to petitioner's vessel, which was not on the high seas but was in the navigable waters of the United States, determined by the general maritime law. However, since his injuries resulted in his death an additional factor appears. The general maritime law, which has no positive rule denying recovery for wrongful death but merely has a void in the general body of maritime law on this question, in order to permit a remedy in this situation adopts and enforces a state wrongful death act where it would otherwise apply. Where, as in the case of the New Jersey Wrongful Death Act, it appears that the statute itself makes the test of liability the rights of the deceased if he had lived there is no conflict between the general maritime law and the state statute. The maritime law would determine the rights of the deceased if he had lived and hence the state statute incorporates the general maritime law by reference in this situation.

Only if it were concluded that the state statute, in spite of its referral language, required the application of state-law principles of analogous land situations does the possibility of conflict between state law and general maritime law arise. The New Jersey Wrongful Death Act does not present such a problem. If it did, the general maritime law would adopt only so much of it as is necessary to fill the void in the general maritime law and the rest would fall in the face of the positive rules of maritime law. The rule of comparative negligence is a positive rule of the maritime law.

The rule of comparative negligence would be applied in this case because the New Jersey Wrongful Death Act does not specifically list the defenses which would be avail-

able to a person sued under its provisions but uses language referring to the right of the deceased to maintain an action if he had lived. In addition, even if the New Jersey statute did provide specifically for the defense of contributory negligence of the deceased where an action was instituted by a non-negligent widow and children the general maritime law would apply its own positive rule of comparative negligence rather than the discredited common-law rule of contributory negligence.

In addition to the referral features of the statute, it uses the words "wrongful act, neglect, or default" which are broadly construed in accordance with the remedial intent of the legislature in enacting the statute. It therefore includes an action based on unseaworthiness as well as on negligence.

The work performed by the deceased, at the time of his injury was ship's work. It could have been done by any qualified member of a ship's crew. Modern vessels carry a great deal of electrical equipment on board and have on board electricians and other members of the ship's engineering force who operate, repair, and maintain electrical equipment. The work done by the deceased in spray cleaning the armature and field windings to remove traces of dirt and film on the generators was in the nature of ship's maintenance. It was in no sense a major repair. The vessel remained tied up and in the water. It had both a captain and a crew. During the period the vessel was tied up the vessel's crew worked on the vessel in the same parts of the ship as did the deceased. The deceased was entitled to a seaworthy vessel.

The failure of the vessel to have adequate ventilation at the time the deceased worked with carbon tetrachloride pursuant to the specification prepared by the vessel rendered the vessel unseaworthy. Furthermore since the offi-

cers of the vessel knew that the work to be done involved the use of carbon tetrachloride in a confined place and they knew or should have known that it was dangerous in confined places and that the ventilation available was inadequate and rendered the place of work unsafe they breached a non-delegable duty to provide the deceased with a safe place to work.

The evidence amply supported the verdict of the jury. The decision of the Court of Appeals should be affirmed.

POINT I

The plaintiff's deceased husband was entitled to a seaworthy vessel and she could recover for his death resulting from the failure to supply a seaworthy vessel.

(a) ***The deceased was engaged in performing "ship's work" and entitled to the warranty of seaworthiness.***

The trial judge stated in his charge to the jury (R. 44):

> "Halecki as an electrician engaged in cleaning the generators was performing a function usually carried out by a ship's crew. Under this circumstance, the law imposes upon the defendant, the Association, the same duty it owed to its regular crew members that is, to supply Halecki with a seaworthy vessel."

The test by which the duty to furnish a seaworthy vessel to one other than a member of the crew is judged was set forth by the United States Supreme Court in *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 412:

> "• • • We reject it again and adhere to Sieracki. We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny

> Hawn the protection we held the law gave Sieracki. *These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.* * * *" (Italics ours.)

In the *Hawn* case the injured workman was a carpenter. The court in the *Hawn* case had refused to place any limitation on the *Sieracki* case and clearly advised that the warranty of seaworthiness did not depend on the label given to a workman's occupation but does depend on the relationship of the work done. Seamen have traditionally performed and do perform many tasks which are classified as "ship's work." These are not limited to loading and unloading but include cleaning and maintenance as well. The deceased in this case was doing "ship's work" because, at the time he was injured, he was cleaning certain shipboard electrical equipment. The specifications refer to the work the deceased was doing as "spray clean with carbon tetrachloride" (Exh. P-5, R. 146). This was basically maintenance work, maintenance work is work traditionally performed by seamen. In fact, the ship's crew was actually participating in the cleaning and maintenance work being done on the vessel and, as their share of the work under the specifications, actually removed the 8 cylinder heads of the generators which the deceased cleaned (R. 146). Also, the ship's crew were working on the vessel's engines. Donald Doidge testified (R. 75):

> "Q. And were the members of the ship's crews and officers, were they aboard the vessel all week? A. Yes, sir.
>
> Q. What were they doing aboard the vessel all week? A. Well, the engine crew were working on the diesel engines down below decks.

Q. Now what were they doing with them? A. They were removing the heads on the diesel engines, I don't know in reference to what.

Q. That was the ship's crew that was doing it? A. That is right.

Q. And you saw them working there? A. Oh, yes."

The fact that members of the ship's crew also worked in the area where the deceased worked has significance. In *Crawford* v. *Pope & Talbot*, 206 F. 2d 784 (3 Cir. 1953) where tank cleaners recovered for the unseaworthy condition of a vessel, Chief Judge Biggs stated at page 790:

"• • • • Their work in the deep tanks were clearly 'ship's work' within the meaning of the Sieracki case. At the very time Crawford and Lucibello were engaged in cleaning the deep tanks in No. 1 hold, seamen of the ship were similarly engaged in the deep tanks in an adjoining hold. Had one of those seamen been injured under circumstances like those before us, he would clearly have been entitled to recover for unseaworthiness of the ship. We see no reason for differentiating the situation of the present libellants. Moreover, as our discussion of the unseaworthiness of the Jones has indicated, the safe and successful completion of Crawford's and Lucibello's work was closely dependent upon the cooperation of the ship in furnishing needed appliances. This dependence supports our conclusion that the doctrine of unseaworthiness covers the injured parties here."

The basis for the duty to provide a seaworthy vessel to those engaged in "ship's work" was stated by Mr. Justice Rutledge in *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) at page 95:

"• • • • All the considerations which gave birth to the liability and have shaped its absolute character dictate that *the owner should not be free to nullify it by parcelling out his operations to intermediary employers*

whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. • • • *That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.*" (Italics ours.)

The test relating to "ship's work" set forth in the *Sieracki* and reaffirmed in the *Hawn* case has been broadly interpreted.

The work done by the deceased in this case was traditionally "seaman's work." In any modern vessel an electrician or an engineer with knowledge of electricity is a vital part of a ship's crew. In La Dage, *Merchant Ships* (Cornell Maritime Press 1955) at page 344, the author in describing the Engineering Department on a vessel states:

"• • • In the absence of an electrician on the staff, the Third Assistant usually takes care of electrical

maintenance. * * * On larger ships, Junior Engineers may be employed to act as assistant watch engineers. During repairs they assist where needed. * * *.

Depending upon the size of ship, many additional personnel may be required including a Chief Electrician and assistant electricians, * * *"

There appears in *Proceedings of The Merchant Marine Council, United States Coast Guard* Vol. 12, April 1955, No. 4 at page 61 an article entitled "Safety and Maintenance of Electrical Equipment." The article stresses that on every ship, "a routine inspection and maintenance program be set up for the proper care of electrical machinery because of frequent changes in the crew who care for and operate this equipment." Among other things the article states at page 62:

> "There are various solvents used for cleaning insulation and windings of electrical machinery of oily and greasy deposits. Carbon tetrachloride and stoddard solvent, or a combination of the two, are frequently used for this purpose. Gasoline or benzine should never be used for cleaning purposes on shipboard, because of the great fire hazard involved. While stoddard solvent is a petroleum product it is utilized because of its high flash point.
>
> Care must be exercised when using carbon tetrachloride because of its toxic effects. Persons working with this material must avoid breathing the fumes. For this reason the area where the cleaning is taking place should be well ventilated."

The use of electrical equipment on board a vessel is of comparatively recent origin. However, the electrician on board a modern vessel serves as important a function in the ability of the vessel to navigate as any other member of a vessel's crew. The agreement between the National Maritime Union of America and various companies and agents in Atlantic and Gulf Coast Ports of June 16, 1956

lists the following specific unlicensed personnel classifications under the agreement: "Electricians," "Watch Electricians," "Day Electricians," "Second Electrician," "Deck Electrician," "Maintenance Electricians." This illustrates the fallacy in the contention of the defendant that the work of the decedent was not work "traditionally performed by seamen." Modern vessels are large and complex mechanisms. Even those vessels that are not electric motor ships use large quantities of electrical equipment for lighting, auxiliary power, and other functions on a vessel. Obviously, whatever their designation, each such vessel must have one or more members of the crew who are trained to inspect, clean, and maintain electrical equipment on board. The fact that the owner may seek to have certain types of maintenance work done by a contractor employee and "seeks to have it done with the advantages of more modern divisions of labor" to use Mr. Justice Rutledge's words, "does not minimize the hazard and should not nullify his protection." *Seas Shipping Co.* v. *Sieracki, supra.*

The test based on analogy of work was applied in *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La. 1957). In that case the libellant, a plumber-machinist, employed by an independent contractor was injured while on a scaffold replacing some salt water pipe on the vessel. The court held that the scaffolding used, whether furnished by libellant's employer or by the vessel, rendered the vessel unseaworthy and allowed recovery. Judge Wright rejected the view that the work of the libellant did not entitle him to a seaworthy vessel because it did not involve loading equipment as in the *Hawn* case. He stated at page 657:

> "* * *. The short answer to this argument is that the *S.S. Del Mar* herself regularly carries a plumber-machinist as a member of her crew. And a plumber-machinist is precisely the type of seaman qualified to repair or replace short lengths of one-inch pipe.

If warranty of seaworthiness applies to landsmen aboard a vessel performing work historically performed by seamen, it should certainly be applied to landsmen aboard performing work currently performed by seamen."

The peculiarities of maritime conditions apply to electricians as well as to other members of the crew. It is the requirement of working in confined places and in the peculiar conditions caused by the limitations of space, machinery, and structure, inherent in the design of a vessel that creates special risks.

This point was raised by the defendant's attorney when he cross-examined Mr. Doidge (R. 97):

"Q. Had you, for example, used carbon tetrachloride for cleaning generators in a factory, perhaps?

* * * * *

A. When you come right down to it, there is a lot of difference between doing it in an engine room and doing it in a factory, doing it in an engine room on a ship.

Q. Had you ever used it in a factory anywhere on shore before this occasion? A. That I don't know for sure. I don't know for sure.

Q. Do you think it is likely that you did, though? A. It is possible, yes.

Q. And in such a place, wherever it may be, a factory or a building, would they customarily be equipped with any sort of overhead blowers or ventilation system built into the building? A. There is no comparison, sir, between the two."

On the redirect this testimony was amplified (R. 103):

"Q. You were talking about the difference with a factory job. What is the difference between work in the factory and work in this low engine room in this ship? A. Well, usually in a factory or in a place of

business like that, you have much more air space. You have windows all around you and you have higher ceiling space.

Q. It is not confined like in the engine room? A. That's true, there is no comparison.

Q. Was this a confined area, this engine room? A. Well, definitely."

The deceased was entitled to a warranty of seaworthiness because he was engaged in "ship's work." Basically the cleaning of electrical equipment is the type of routine maintenance work which could be performed by any member of the crew who had qualifications as an electrician.

In spite of the language of this court in the *Seracki* case and in the *Hawn* case, the Solicitor General in the brief *amicus curiae* filed herein urges that the test for unseaworthiness is not in comparing the work being done to work done by seamen. The Solicitor General, apparently wishes to turn the clock back and establish a test of "coming and going" to or from a specific voyage for the rule of unseaworthiness. He cites *Despar* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1951). This case involved a definition of the word "seaman" as used in the Jones Act and did not involve any question of unseaworthiness. In this connection Mr. Justice Jackson stated at page 190 with reference to the facts of that case:

"* * *. The boats were not afloat and had neither captain or crew. * * *"

In the present case the vessel was afloat (R. 133). There was a captain and crew on board during the time the vessel was tied up (R. 124). Can the Solicitor General seriously contend in the present case that if one of the members of the ship's engine department had been injured while the vessel was tied up, he would not be covered under the Jones Act or have a claim for unseaworthiness because

of the *Despar* decision? To frame the question, is to answer it. See *Oakes* v. *Graham Towing Co.*, 135 F. Supp. 485 (D. C. Pa. 1955).

Among the other cases cited by the Solicitor General, the case of *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1957) affirming 138 F. Supp. 859 (D. C. Cal. 1955) cert. den. 354 U. S. 938, 77 S. Ct. 1400, L. Ed. (1957) involved major repairs on a dry-docked vessel. In *Raidy* v. *United States*, 252 F. 2d 117 (4 Cir. 1958) cert. den. 356 U. S. 973, 78 S. Ct. 1136, L. Ed. —— (1958) the vessel was also in drydock for structural changes. The case of *Union Carbide Corporation* v. *Goett*, 256 F. 2d 449 (4 Cir. 1958) the vessel was in dry dock for structural changes and the crew had been discharged. In each of these cases the outstanding feature was the fact that the vessels were in drydock for repairs of a major nature. In the present case the vessel remained afloat. The repairs were not of such a substantial nature as to require drydocking.

The defendant's vessel was getting its "annual overhaul" at the time of the accident. The defendant's witness, Walter C. Thompson, characterized the "annual overhaul or the annual repairs" (R. 133):

> "A. Well it consists of painting the boat, making *minor* repairs, changing the lines, working on the engine room, and so forth." (Italics ours.)

The vessel was in navigable waters (R. 80).

The vessel had remained in the water at Rodermond Industries for about three weeks (R. 3; R. 80). The captain of the vessel was on board the vessel every day (R. 123). In addition there were four or five deck men on board and the full complement of engineers and engine room crew on board (R. 124). Some men slept on board the vessel (R. 125). According to the specifications prepared by the vessel the ship's crew were to "remove and replace the 8

cylinder heads" on the very generators the deceased cleaned (R. 146). The crew worked during the "annual overhaul" alongside of the contractors and the work was done under the orders and supervision of defendant's Captain, Chief Engineer and Marine Superintendent (R. 75; R. 76; R. 123 through R. 130).

The vessel on which the deceased was injured was not withdrawn from navigation in any sense of the word. It is true that the vessel's generators were not in operation, but power was substituted from the shore and was used through "the main board of the ship" (R. 7). The vessel's ventilating system did work and was in operation (R. 8). The power that came from the shore was used to operate "the vessel's own equipment" (R. 13). In view of the work that was being done the owners of the vessel apparently found it more efficient and perhaps less expensive to use power from shore rather than use ship's personnel to operate the vessel's auxiliary power sources. This however, did not remove the vessel from navigation. It still had a captain and crew who still performed duties on board the vessel. It was not undergoing such drastic repairs as to change the character of the vessel. It was going through an annual maintenance operation designed to prepare the vessel for its next voyages.

The case of *Berge* v. *National Bulk Carriers*, 251 F. 2d 717 (2 Cir. 1958) involved the virtual rebuilding of the interior of a vessel. Judge Learned Hand who wrote the *Berge* opinion, which was argued a day after *Halecki* and was decided the same day, specifically called attention to the difference in result in the two cases. He stated at page 718:

> "* * *, the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. * * *"

The same distinction was recognized in another case relied on by the Solicitor General. The case of *West* v. *United States*, —— F. 2d —— (3 Cir. 1958) involved a "moth ball" vessel. She had no crew on board and was being rehabilitated for service (S. G. br. p. 26). Judge Goodrich in his opinion distinguished the *West* case from a prior decision of that Court of Appeals, *Read* v. *United States*, 201 F. 2d 758 (3 Cir. 1952). He stated that the *Read* case, which found unseaworthiness in favor of the employee of a subcontractor:

> "* * * is distinguishable, from the instant case at least, on the amount of work involved."

In addition to the *Read* case, other non-longshoremen, non-crewmen cases allowing recovery for unseaworthiness are: *Amerocean Steamship Company* v. *Copp*, 245 F. 2d 291 (9 Cir. 1957) where the employee of an independent contractor who was dismantling grain fittings, removing charterer's property and refurbishing a ship was held to be entitled to a seaworthy vessel; *Torres* v. *The Kastor*, 227 F. 2d 664 (2 Cir. 1955) where it was held that a workman employed by an independent contractor engaged in cleaning loose pitch from a vessel was entitled to a seaworthy vessel; *Pioneer Steamship Company* v. *Hill*, 227 F. 2d 262 (6 Cir. 1955) where it was stated that a shipfitter's helper employed by a contractor who was making repairs to a vessel during its winter layup was "probably within the broadened class of workers" to whom a duty to provide a seaworthy vessel was owed; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (3 Cir. 1953) where a duty of seaworthiness was held to be owed to employees of a contractor hired "to clean the accumulated rust and dirt from the four deep tanks."

The cases in the various Courts of Appeal seem to have developed a line of distinction. They have denied recovery.

for unseaworthiness where the vessel had no crew on board or the vessel was in drydock or both conditions existed, and where in addition, the repairs on the vessel were of a substantial nature and involved either a major rebuilding or replacing of large parts of the vessel or a basic alteration of the structure and character of the vessel itself. There are reasons why, as a matter of policy the doctrine of seaworthiness should extend even to such vessels. However, this court need not consider the broader application of the doctrine of seaworthiness to sustain the courts below in this case because none of these distinguishing factors are present. The vessel in this case was in navigable waters. It had a captain and crew working on it during the time it was tied up. The work done was basically maintenance work rather than major repairs or alterations, and it was work that could have been done by members of a ship's crew who had qualifications as electricians. Under the circumstances, the deceased, at the time he was injured, had a right to a seaworthy vessel.

(b) ***The Wrongful Death Act of the State of New Jersey, N. J. S. A. 2A:31-1 et seq., permits recovery for such "wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages * * *"***

It has been held that the maritime law will enforce a cause of action for death based on negligence applying the New Jersey Wrongful Death Act. *Gill* v. *United States*, 184 F. 2d 49 (2 Cir. 1950). The maritime law will enforce a cause of action for death based on unseaworthiness applying the New Jersey Wrongful Death Act.

This accident happened aboard a vessel docked at Jersey City, New Jersey [R. 80] and therefore the Wrongful Death Act of the State of New Jersey is applicable.

The action for death in the case at issue was based on two distinct grounds of recovery: (1) for negligence, and (2) for unseaworthiness.

N. J. S. A. 2A:31-1 sets forth the following test of liability:

> "When the death of a person is caused by a *wrongful act, neglect or default, such as would,* if death had not ensued, *have entitled the person injured to maintain an action for damages resulting from the injury,* the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages. * * * " (Italics ours.)

There are two key phrases in the part of the statute quoted above. The first is the phrase "wrongful act, neglect or default." The other is the descriptive phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages."

First we discuss the "such as" phrase which directly indicates that the "wrongful act, neglect or default" which it describes has the same scope as the "wrongful act, neglect or default" which would give rise to an action by the deceased himself for personal injuries if he had lived. It is stated in relative terms and it avoids fixing the basis of liability as that existing at the time the statute was enacted. It permits the concepts of liability to develop with the rights of the individual. This is not the kind of statute that requires amendment with every new development in the substantive law of liability for personal injuries. It is rather an act designed to provide for dependents described in the act the same basis of liability as the individual has. It provides for neither more nor less. While the measure of damages may differ in the case of dependents, the basis of liability is coextensive in both wrongful death and personal liability cases. The "such as"

clause establishes that the legislature did not intend it to be otherwise. Since the accident happened on navigable waters, the liability of the defendant to the deceased would be determined by the maritime law.

In the case of *Paulmier* v. *The Erie R. R. Co.*, 34 N. J. L. 151 (Sup. Ct. 1870) Chief Justice Beasley had commented at page 157:

> "* * * It seems to me that the literal language of the statute is to be followed, that is, a right of action exists in all cases in which such right would have existed in the party injured if death had not ensued, * * * "

The referral nature of the statute was recognized in the case of *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. Ct. 1932). The plaintiffs had brought an action under the New Jersey Wrongful Death Act where the Statute of Limitation had barred the claim of the deceased before death. The action was dismissed on motion. After quoting the statute Justice Bodine stated at page 661:

> "It is, of course, arguable that, since the actions are separate, the only bar to the action under the Death Act is the bar contained in the act itself. *But the statute only gives an action if the decedent had one.* In the present cases, the decedents' actions were lost by lapse of time. Since the decedents had no cause of action, their representatives had none. * * * " (Italics ours.)

It would be an unjust result and a harsh construction to interpret the statute with respect to some given basis of liability to say that the deceased, if he had lived and were totally disabled as a result of an injury, could receive (in addition to other elements of damage) his past and future loss of earnings; while if he died, his widow and infant children whose lives and happiness depend in large part on such earning power would be left remediless

and in many cases penniless. It would thwart the obvious policy of the wrongful death act and certainly would not give the act the liberal construction intended.

In *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865), Chief Justice Beasly had stated in connection with the interpretation of this act at page 350:

> " • • • The design of the act cannot be mistaken. It is entirely and in the highest sense remedial in its nature. Its object was to abolish the harsh and technical rule of the common law-actio personalis moritur cum persona. The rule had nothing but prescriptive authority to support it; it was a defect in the law, and this statute was designed to remove that defect. It is, therefore, entitled to receive the liberal construction which appertains to remedial statutes."

The remedial nature of the statute was recognized again in *Murphy* v. *Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). It was claimed that the word "corporation" used in the New Jersey Wrongful Death Act was not broad enough to permit actions to be instituted under the act against public, municipal, or quasi-municipal corporations. This argument was rejected by the court, Judge Lippincott stating at page 231 of Atlantic:

> " • • • In the construction of a remedial statute, the rule is to avoid all subtle inventions and evasions for the continuance of the remedy, et pro privato commodo. The duty of the court is to add force and life to the cure and remedy, according to the true intent of the maker of the act, pro bono publico. • • • ".

See also *Hartman* v. *City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957); *Turon* v. *J & L Const. Co.*, 8 N. J. 543, 86 A. 2d 192 (1952); *Cetofonte* v. *Camden Coke Co.*,

78 N. J. L. 662, 75 A. 913 (1910); *Carianni* v. *Schwenker*, 38 N. J. Super. 350, 118 A. 2d 847 (App. Div. 1955).

In this case, the deceased would have had two causes of action for personal injuries: (1) for negligence (2) for unseaworthiness. The intention of the legislature was in the event of his death, to give his dependents the same causes of action which he would have had, if death had not ensued. It follows that the legislative intent was to give to the dependents of the deceased both causes of action (1) for negligence and (2) for unseaworthiness which he would have had if he lived.

Keeping in mind the remedial nature of the statute we now consider the meaning of the phrase "wrongful act, neglect or default." If the phrase were intended to be confined to acts of "negligence" the words "wrongful act" and "default" are unnecessary. In construing a statute, courts do not readily assume that words in a statute are superfluous. Both the words "wrongful act" and "default" in their natural meaning connote something much broader than mere negligence. Negligence in a legal sense is always a "wrongful act" and is sometimes the result of a "default." However not all "defaults" constitute negligence, nor do all wrongful acts fall within that classification.

The construction of these words were an issue in the case of *Oroz* v. *American President Lines, Ltd.*, 154 F. Supp. 241 (S. D. N. Y. 1957). In that case Judge Walsh held "unseaworthiness" to come within the scope of this phrase as used in the New Jersey Statute of Limitations. Judge Walsh stated at page 243:

> "The next question is whether the analogous New Jersey Statute of limitations had run. That statute is N.J.S. 2A:14-2, and it reads as follows:
>
> 'Every action at law for an injury to the person caused by the *wrongful act, neglect or default* of any person within this state shall be commenced within

2 years next after the cause of any such action shall have accrued.'

The New Jersey courts have held this statute to be applicable to all claims for personal injury whether based upon tort or contract. In Burns v. Bethlehem Steel Co., 20 N. J. 37, 118 A. (2d) 544, a rigger employed in defendant's shipyard, sued for personal injuries claiming to be a third-party beneficiary of a contract between his union and the defendant, which he alleged was breached by failure to provide certain safety devices. The court held that the two-year statute was applicable, rather than the six-year statute provided for contract claims. In so holding it followed Weinstein v. Blanchard, E. & A., 109 N. J. L. 332, 162 A. 601, a case in which a patient claimed for injuries caused by the malpractice of a physician alleging a breach of the contractual relationship with the physician. Although the Weinstein case was decided under an earlier statute which was different in form, the Burns case held that the changes in the statute were merely as to form, not substance; that there was no evidence of a legislative intent to change the rule of the Weinstein case. The Weinstein case was also followed in Martucci v. Koppers Co. (D. C. N. J.), 58 F. Supp. 707.

It is, therefore, my conclusion that plaintiff's action would be barred in the New Jersey courts, and consequently that it would also be barred in New York courts.

Liability for unseaworthiness is not based upon fault. * * * The employer's breach of his obligation has been characterized as a tort which arises out of the maritime status or relation. * * * Its original derivation may be lost in the past. *Yet there can be no question, regardless of the nature of the shipowner's obligation, that this is a claim for personal injury based upon its alleged wrongful failure to perform its obligation. Accordingly, in New Jersey the claim would be governed by the two-year statute of limitations.*" (Italics ours.)

This decision was very recently affirmed [#208 Oct. Term, Decided Sept. 30, 1958, 2 Cir.], citing both *Halecki* and *Skovgaard.*

Judson v. *Peoples Bank & Trust Company of Westfield*, 17 N. J. 67, 110 A. 2d 24 (1954) was an action based on an alleged fraudulent conspiracy to oust plaintiffs from control of a bank. Among other things the case involved the application of the New Jersey Joint Tortfeasor's Contribution Law, N. J. S. A. 2A:53a-1 which used the phrase "wrongful act, neglect or default of joint tortfeasors." It was conceded on argument that the term "wrongful act" is most broad and comprehensive. In its opinion the court cited *Louis Schlesinger Co.* v. *Rice*, 4 N. J. 169, 72 A. 2d 197 (1950) and defined the term as "any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." In the course of his opinion Mr. Justice Brennan referred to the fact that the same language appears in the Wrongful Death Act. He stated at page 35 of Atlantic:

> "* * * And the statute creating a right of action for death by wrongful act, N. J. S. 2A:31-1 et seq., N. J. S. A., gives the right whenever 'the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury.' We are aware of no authority in this State which has suggested a limitation of the right of action under that statute to cases of death resulting from negligence. The statute was adopted from England, and 23 Halsbury's Laws of England (2d Ed. 1936), p. 691, is authority that 'this term includes direct acts of trespass to the person, as well as criminal acts of violence.' * * *"

Mr. Justice Brennan then concluded as to the role of the phrase "wrongful act, neglect or default" in the Joint Tortfeasor's Act at page 36:

> "* * * The more reasonable interpretation is that the expression was included to fortify the intended

comprehensiveness of sections 1 and 2 taken from the draft of uniform act and leave no doubt that all torts of commission and omission were within the ambit of the law."

The phrase "wrongful act, neglect or default" has been construed to include an action based on a breach of warranty of fitness for use under the New York Statute. In *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938) the plaintiff's wife died as a result of eating infected pork frankfurters purchased from the defendant. The plaintiff's cause of action for negligence was dismissed by consent. The motion to dismiss the cause of action based on a breach of warranty was denied. Justice Rippey speaking for the New York Court of Appeals posed the issue at page 31:

"* * * The inquiry here is whether the breach of the implied warranty as alleged in the complaint, negligence being disclaimed, was a 'wrongful act, neglect or default' within the meaning of the statute. * * * "

After considerable discussion of the history and nature of the wrongful death acts, he stated at page 34:

"* * * At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. * * * Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy. * * * Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default and, in its essential nature, a tort. * * *

"We conclude that the breach of the warranty in a case such as this was a 'default' or 'wrongful act' within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. * * *

" * * * Apropos are the words of Judge Cardozo in the closing paragraph of his opinion in Van Beeck v. Sabine Towing Co. * * * where he refers to the construction to be given death statutes. 'Death statutes,' he writes, have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow of grudging process of construction were to exemplify and perpetuate the very evils to be remedied. * * * There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source or law, a new generative impulse transmitted to the legal system. * * * "

Cf. also *Sullivan* v. *Dunham*, 161 N. Y. 290, 55 N. E. 923 (1900).; *Greenwood* v. *John R. Thompson*, 213 Ill. App. 371 (1919); *Roche* v. *St. John's Riverside Hospital*, 96 Misc. 289, 160 N. Y. S. 401 (1916) aff'd 161 N. Y. S. 1143 (App. Div. 1916); *Grein* v. *Imperial Airways Ltd.*, 1 K. B. 30; (1936) 2 All. E. R. 1258; C. A.; *Jackson* v. *Watson & Sons*, 2 K. B. 193 (1909); *The H. S. Inc. No. 72*, 130 F. 2d 341 (3 Cir. 1942).

There is every reason in logic and in justice to consider unseaworthiness a maritime tort which is a "wrongful act, neglect or default." In *Seas Shipping Co.* v. *Sieracki*, 149 F. 2d 98 (3 Cir. 1945) Judge Goodrich after pointing out that so far as "warranty" depended on contract, a stevedore was not a party to a contract, he concluded at page 101:

" * * * And so an injury to a stevedore comes within the classification of a marine tort. * * * "

The United States Supreme Court in the same case in 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), Mr. Justice Rutledge speaking, stated at page 877:

> "• • • It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. • • • Carlisle Packing Co. v. Sandanger, supra, it is a form of absolute duty owing to all within the range of its humanitarian policy."

In the case of *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956), Judge Waterman considered the various theories on which a federal court, sitting on the civil side, could have jurisdiction of an action based on unseaworthiness where an action for negligence under the Jones Act is also pleaded. In considering "pendent jurisdiction" as a ground he reviewed the nature of the two theories of recovery. He stated at page 258:

> "• • • The Jones Act claim for negligence and the maritime claim for unseaworthiness provide seamen with two different grounds of relief for the commission of the same wrong. A judgment on one claim bars a second suit based on the other claim. • • • Since both claims are based on the same operative facts, they constitute a single 'cause of action.' • • • Because of the *extremely close relation* of the two claims, and the virtual identity of their factual components, it is arguable that a federal district court, having properly taken jurisdiction at law under the Jones Act over the negligence claim, has jurisdiction at law over the closely related unseaworthiness claim. • • • "

In view of the "close relation" of causes of action based on negligence and unseaworthiness it is difficult to conceive why the broad "wrongful act, neglect or default" classification does not apply to both. See also the comment of Judge

Learned Hand in *Gill* v. *United States*, 184 F. 2d 49, 57 (2 Cir. 1950).

Unseaworthiness falls within the broad classifications of "wrongful acts" or "defaults" if not "neglects." There is no reason to suppose that the legislature, while using referral language, intended to exclude "unseaworthiness" from the New Jersey Wrongful Death Act whenever it would otherwise apply. The broad language of the statute indicates a contrary intent. The liberal construction to which the statute is entitled also compels a contrary result. It certainly is not just, to deprive dependents of a right to recovery which the deceased himself would have had if he had lived, if the basis of liability is unseaworthiness, but to permit recovery where the basis is negligence.

The petitioner places weight on *Moran* v. *Moore McCormack Lines*, 131 N. J. L. 332, 36 A. 2d 415 (Sup. Ct. 1944) and *Santa-Maria* v. *Lamport & Holt Line, Ltd.*, 119 N. J. L. 467, 196 A. 706 (E. & A. 1938) saying that "in these cases the New Jersey courts have, with reference to the Wrongful Death Act consistently confined its application to negligence situations" (P. br., 15, 42). In the *Santamaria* case *supra* the plaintiff had won on the theory of negligence for the death of a worker who had been unloading a vessel. There was no need for the widow to argue or for the court to consider any issue except whether to sustain the verdict based on negligence. The court affirmed the verdict for plaintiff. It is interesting to note that the court cited two federal court decisions for the proposition that the owner of the vessel owed the employee of a consignee a safe place to work. The *Moran supra* case did not involve a death action at all. The plaintiff's case was tried on a theory of negligence, the Supreme Court of New Jersey, then an intermediate court of appeal, affirmed a non-suit holding that the plaintiff stevedore had failed to prove negligence.

In neither case was the doctrine of unseaworthiness urged upon or discussed by the appellate courts. It must be remembered that it was not until 2 years after the last decision that this court decided that a longshoreman was entitled to a seaworthy vessel. *Seas Shipping* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). Therefore no valid conclusion can be drawn from the lack of discussion of unseaworthiness in either state-court case.

Two Courts of Appeal have accepted the respondents' construction of the New Jersey Wrongful Death Act. They construed it remedial, referral in nature as to liability, and broad enough to include an action based on unseaworthiness as well as negligence. This construction is supported by the decisions of the New Jersey courts.

Not only was the deceased entitled to have a seaworthy vessel at the time of his injury on petitioner's vessel, but the widow and children of the deceased are entitled to sue under the New Jersey Wrongful Death Act for a breach of the duty to supply a seaworthy vessel where such breach of duty resulted in death.

POINT II

The duty of the vessel to provide the deceased with a seaworthy vessel and appliances was absolute and non-delegable.

Where a shipowner owes a duty to provide a seaworthy vessel to a seaman or other worker on his vessel, it is well established that his duty is absolute and non-delegable. *Seas Shipping Co.* v. *Sieracki*, 328 U. S 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Petterson* v. *Alaska S.S. Co.*, 205 F. 2nd 478 (9 Cir. 1953), aff'd *per curiam* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); *Yanow* v. *Weyerhaeuser Steamship Co.*, 250 F. 2d 74 (9 Cir. 1958); *Sprague* v.

The Texas Co., 250 F. 2d 123 (2 Cir. 1957); *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F. 2d 875 (3 Cir. 1957); *Johnson Line* v. *Maloney*, 243 F. 2d 293 (9 Cir. 1957); *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952).

In the case of *Amador* v. *A/S J. Ludwig Mowinckels Rederi*, 224 F. 2d 437 (2 Cir. 1955), cert. den. 350 U. S. 901, 76 S. Ct. 179, 100 L. Ed. 791 (1955), a stevedore was injured by wire coils being discharged. It appeared that if the cargo had been discharged in one sequence there was no danger but if discharged in another order it was dangerous. In holding the ship liable for an unseaworthy condition, Judge Learned Hand stated at page 440:

> "We read Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 as definitely laying it down that longshoremen discharging a ship are in the same position vis-a-vis the ship as members of her crew; * * * The stowage was therefore only conditionally proper, and we do not see how the ship can escape liability when she allowed a stow, only conditionally proper, to be discharged without fulfillment of the condition. * * * Under Seas Shipping Co. v. Sieracki, supra, the longshoremen as, pro hac vice members of the crew, were exposed to the dangers of a negligent stow as long as the condition remained unfulfilled. What Lunde did was indeed quite natural in view of the contract between the ship and the longshoremen's contract; but it did not fulfill the condition. *Unless we have misunderstood the doctrine, the situation as to the ship's liability is precisely as though the crew had been discharging the strips, and Lunde had not seen to it that the discharge of the strips at the earlier port had not been made in accordance with what its position in the stow demanded if its discharge was to be safe.*"

The condition of the ship's ventilating system in the present case was such that, although seaworthy for ordinary ventilation, it was unfit and unsafe for the use to which it was put, when, pursuant to the directions of the marine superintendent of the defendant, carbon tetrachloride was used in the confined spaces of the vessel's engine room.

As stated in the *Amador* case, the deceased was in the same position vis-a-vis the ship as members of her crew. The defendant's orders for the use of carbon tetrachloride, which they knew was a dangerous chemical in confined spaces, was improper unless the defendant furnished adequate ventilation to remove harmful fumes. This was a condition to be fulfilled by the defendant. Ordering the use of carbon tetrachloride in the confined area of the engine room without the fulfillment of the condition resulted in an unsafe and unseaworthy condition for which the jury found the defendant liable.

The failure of defendant to furnish adequate ventilating appliances created the unsafe and unseaworthy condition. The ventilating system was supplied by the vessel. The auxiliary blower was supplied by Rodermond. This equipment was inadequate for the purpose intended, namely spray cleaning with carbon tetrachloride, ordered by the defendant. The doctrine of unseaworthiness includes the failure to supply proper appliances.

POINT III

The duty of the vessel to provide the deceased with a safe place to work and to exercise due care for his safety was continuing and non-delegable.

The defendant does not dispute the right of the plaintiff to bring an action based on negligence. The right to recover on this ground, applying the New Jersey Wrongful Death Act, is established. *Gill* v. *United States,* 184 F. 2d 49 (2 Cir. 1950). The deceased occupied the status of a business invitee aboard the vessel. As such the defendant owed to him the duty to provide a safe place to work. This duty was continuous and non-delegable.

There was ample evidence that the vessel was an unsafe place for the deceased to work. Since the duty of the vessel was non-delegable and persisted regardless of any concurrent duty on the part of the deceased's employer or of Rodermond, the jury was amply justified in finding the defendant negligent. This is emphasized by the fact that the defendant specifically directed the use of a dangerous chemical as a cleaning agent.

It has been held by this Court in *Puleo* v. *H. E. Moss,* 159 F. 2d 842 (2 Cir. 1947) that the measure of care owed to a business invitee is the same as that owed by employer to his employee. The extent of this duty was discussed by Judge Learned Hand in the case of *Guerrini* v. *United States,* 167 F. 2d 352 (2 Cir. 1948) where he held that a failure to take affirmative steps to provide for the business guest's safety is a breach of duty. Cf. *Meni* v. *Carlson,* 6 N. J. 82, 77 A. 2d 245 (1950).

In the case of *Anderson* v. *Lorentzen,* 160 F. 2d 173 (2 Cir. 1947), the plaintiffs, longshoremen, were injured when they came into contact with cashew nut oil which caused a

dermatitis. Plaintiffs' employer knew of the danger and had a special cream on the dock for the use of the plaintiffs. Among other things, Judge Chase stated at page 174:

> "* * * Apparently the plaintiffs were not told to use it and, in any event, neither of the defendants supplied anything of the sort or warned the plaintiffs of the danger.
>
> The defendants-appellants have argued that, since the employer of the stevedores who unloaded the liquid was aware of the danger, they were under no duty to warn those who worked for that independent contractor. We cannot agree. The defendants-appellants not only owed the duty to provide a seaworthy ship on which these stevedores who unloaded the cargo might work, Seas Shipping Co. Inc. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, but they owed them, as invitees, or business visitors, the duty to provide a reasonably safe place to do their work. Fodera v. Booth American Shipping Corp., 2 Cir., 159 F. 2d 795. This duty was non-delegable and persisted despite any concurrent duty on the part of the stevedoring company. * * *"

In the case of *Gunnarson* v. *Robert Jacobs Inc.*, 94 F. 2d 170 (2 Cir. 1938) cert. den. 303 U. S. 660, 58 S. Ct. 764, 82 L. Ed. 1119 (1938) the accident involved an explosion of propane gas shipped in a tank on a yacht and used for cooking purposes. In reversing a decree which had been rendered against the widow for the death of her husband, a captain of the vessel. Among other things, Judge Learned Hand stated at page 172:

> "* * * It is of no moment that it was harmless so long as it did not leak, and that it would not leak if it was properly handled. In such cases liability depends upon an equation in which the gravity of the harm, if it comes, multiplied into the chance of its occurrence, must be weighted against the expense, inconvenience and loss of providing against it. The harm may be so great as to impose an absolute liability regardless

> of any negligence; in such cases the very activity, though lawful, entails responsibility, and reparation becomes a cost of the enterprise, as under workmen's compensation. * * *"

The great danger involved in using carbon tetrachloride was admitted by all witnesses. The jury had ample evidence which warranted a finding that the defendant was fully aware of the danger involved. It is to be noted that none of the ventilation or blower equipment used belonged to the deceased's employer.

In the case of *Hoff* v. *United States*, 87 F. Supp. 909 (D. C. Wash. 1949), a seaman was injured while spraying paint on board a vessel. In finding for libelant, Judge Bowen stated at page 911:

> "The evidence and a preponderance thereof received in this case requires the Court to and the Court does therefrom find, conclude and decide that the *vessel was for the purpose of carrying on this spray painting work in the engineroom inadequately and improperly ventilated, resulting in a negligent and unsafe condition in and about the ship* at the place and time when the libelant and his fellow seamen were doing the spray painting work, and that as a proximate result thereof the libelant and others of his fellow seamen were caused to cough and to experience difficulty in their breathing and irritation and injury to the membranous lining of their lungs. * * *
>
> The preponderance of the evidence in this case convinces the Court that spray painting was not customarily done upon Liberty ships, that it had been done on some ships only when there was forced ventilation such as was produced by ventilating machines on board the vessel, and that there were no such ventilating machines on the Bloomquist on which libelant was working when he was injured. Respondent was thus negligent in not providing suitable ventilation in the

engineroom while libelant was spray painting there." (Italics ours.)

In the case of *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438, —— L. Ed. —— (1958) which involved an action for indemnity between a vessel and stevedoring company, Mr. Justice Clark commented on the basis of the original suit by a longshoreman injured when a piece of wood from a temporary winch shelter hit him. He recognized that in the original negligence action, "The test of liability was based on failure to perform a non-delegable duty."

The evidence supporting the findings of the jury are discussed elsewhere in this brief. The cases establish that the duty owed was non-delegable. The defendant directed the use of a chemical in a confined space which was highly dangerous to human life if proper ventilation were not provided. The defendant knew or should have known that the ship's ventilation system and the auxiliary blower furnished by Rodermond were inadequate. Its failure to furnish adequate ventilating equipment or require the contractor to furnish it, constituted a breach of its duty. The very dangerous qualities of the chemical to human life when used in confined areas imposed a duty on defendant commensurate with the danger. This duty defendant failed to perform.

POINT IV

The rule of comparative negligence was properly applied in the present action.

The attorney for the petitioners conceded that the general maritime law applied in this case. He had stated (R. 80):

> "The Court: Mr. Mahoney, is there any question but what this vessel was in navigable waters?
> (58) Mr. Mahoney: I think not, sir.
> Mr. Baker: All right.
> The Court: And you agree that the general maritime law prevails?
> Mr. Mahoney: There is no issue there, sir.
> Mr. Baker: All right."

Now, on appeal, they take a contrary position and claim that the general maritime law does not apply.

We note that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 *et seq.* does not anywhere state that contributory negligence is a defense to an action under the act. Cf. *The Devona*, 1 F. 2d 482, 484 (D. C. Me. 1924). The substantive law relating to liability is incorporated by reference and is coextensive with the substantive law of liability for personal injury as distinguished from wrongful death.

It is not questioned that in common-law actions arising under the New Jersey Wrongful Death Act, common-law defenses are applied. The act itself measures liability by the test of whether or not the deceased, if death had not ensued, would have been able to maintain an action. Obviously in a common-law action, which is what is involved in all the New Jersey decisions cited by defendant in its brief, the common-law defenses would bar recovery. Logically, therefore, in a maritime case, the maritime defenses should pre-

vail because the act itself refers to the substantive rules of maritime law in such cases.

Even as a matter of statutory construction, the courts must imply a *sang-froid* to the New Jersey legislature in order to hold that whereas a seriously injured father and husband is entitled to a recovery under the maritime law even if contributorily negligent, his wholly innocent children and wife would be denied such recovery if he dies from his injuries. The legislature has not set forth this defense in the statute. Courts do not construe statutes in such a way as to produce harsh or absurd results. See *Cox* v. *Roth*, 348 U. S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Giordiano* v. *City Commission of Newark*, 2 N. J. 585, 67 A. 2d 454, 458 (1949). This statute is a remedial one and is entitled to a liberal construction. Therefore under the terms of the New Jersey statute itself, independently of any compulsion from a positive rule of maritime law, the rights of a widow and children with reference to the contributory negligence of a deceased workman are coextensive with the rights he would have enjoyed had he lived.

There is another ground for holding that contributory negligence is not a defense under the maritime law where a state wrongful death act is applied. The reason that maritime law permits a state wrongful death act to be applied where certain individuals die as a result of injuries received on navigable waters within a state's geographic boundaries is that there is a void in the maritime law on this point. Congress in the development of maritime law has not afforded any remedy by statute for wrongful death in such circumstances. While there is a void as to wrongful death this is not true concerning the defense of contributory negligence. Admiralty courts have fashioned a strong positive rule concerning comparative negligence. While the

enforcement of a state statute giving a remedy for wrongful death merely fills a void, the enforcement of a state rule of contributory negligence would collide with the positive, well established rule of comparative negligence in maritime law.

In the case of *Wilburn Boat Company* v. *Fireman's Fund Insurance Company,* 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) Mr. Justice Black, in holding that state laws could be applied in disputes arising from a maritime insurance policy stated at page 370:

> "Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. * * * But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. *In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States.* As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.
>
> Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since *in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.* * * *"* (Italics ours.)

What, then, is the substantive maritime law as it relates to liability for personal injury? In *Hawn* v. *Pope & Talbot,*

Inc., 198 F. 2d 800 (3 Cir. 1952), Judge McLaughlin stated at page 806:

> "* * * Appellant advances the flat proposition that since it is a diversity action the Pennsylvania contributory negligence rule which defeats recovery must be applied. * * *
>
> "We think that appellant's view is incorrect. * * *"

On appeal the judgment of the court was affirmed in 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 408:

> "(a) *The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.* Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.
>
> "(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in its substantive as well as its procedural features. * * * * * * And Hawn's complaint asserted no claim created by or arising out of Penn-

sylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling.* While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * * " (Italics ours.)

In *O'Leary* v. *United States Line Company,* 215 F. 2d 708 (1 Cir. 1954), cert. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955), Judge Woodbury reviewed several decisions, including one from this circuit, and discussed the question of contributory negligence under a state wrongful death act. He stated at page 711:

"* * * But these cases were all decided prior to Pope & Talbot, Inc. v. Hawn, 1953; 346 U. S. 406, 74 S. Ct. 202 wherein the Supreme Court of the United States in a civil action on the law side under the saving clause for the first time held categorically that the rights of a shore worker to recover for personal injuries short of death occurring on a vessel in the navigable waters of a state resulting from either the negligence of the shipowner or the unseaworthiness of the vessel are to be determined by the general maritime law and not by the law of the state within whose waters the accident occurred. That case, of course, is not squarely in point here, but in the Court's opinion 346 U. S. at page 409, 74 S. Ct. at page 205 it is said by way of dictum that 'Even if Hawn were seeking to enforce a state-created remedy for this right (referring to his right of recovery for unseaworthiness and negligence), federal maritime law would be controlling.' Indeed, in our opinion it would be incongruous to hold, in conformity with Pope & Talbot, Inc. v. Hawn, supra, that the maritime law determined the respective rights

of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in Chelentis v. Luckenbach S.S. Co., 1918, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important. * * *"

In *The Devona*, 1 F. 2d 482 (D. C. Me. 1924) the court had before it the Maine Wrongful Death Act which uses the same key phraseology as the New Jersey Act. In denying the applicability of the common-law defense of contributory negligence, Judge Held stated among other things at page 484:

"The case at bar also discloses rights distinctly maritime and 'recognized by the law of the sea,' without regard to the court where the libelant may seek relief. The libelant must take the state statute with its limitation; *but the limitation of contributory negligence is not found in the statute.* A state court may well find that it cannot settle a maritime case by the common-law rules of procedure, and must enforce the libelant's rights under the maritime provisions as disclosed in the Jensen Case, which has held that 'no state has the power to abolish the well-recognized maritime rule concerning the measure of recovery,' and substitute therefor the full indemnity rule of the common law.'" (Italics ours.)

There are two distinct grounds for holding that contributory negligence is not a defense to this action under the New Jersey Wrongful Death Act. The first is based on the interpretation of the act itself. The act does not state that such defense is available in an action for wrongful death. On the contrary, the referral phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages" is used, N. J. S. A. 2A:31-1. This phrase, by referring to the rights of the person injured, if death had not ensued, indicates that not only is the substantive law relating to the nature and scope of liability for personal injury incorporated into the wrongful death act, but the defenses are incorporated as well. There is certainly no reason to suppose the legislature intended to give any better or stronger defense to the respondents where a widow and dependent children sue than where the injured himself sues.

The second ground is based on the fact that the injury occurred on navigable waters of the United States and is covered by substantive maritime law which supersedes and overrules inconsistent state law. The doctrine of comparative negligence is a positive rule of maritime law and is firmly embedded in maritime law. There certainly is no reason why it should be replaced by a harsh and inconsistent state doctrine.

In this connection we note that *Klingseisen* v. *Costanzo Transportation Co.*, 101 F. 2d 903 (3 Cir. 1939) cited by defendant, held that in an action under maritime law applying the Pennsylvania Wrongful Death Act, the absolute defense of contributory negligence would be applied. In that case the deceased was drowned in a collision between his own boat and a steam boat. No issue of unseaworthiness was involved. Since this case involved an application of a Pennsylvania statute and its interpretation by Pennsyl-

vania courts it is not controlling in an interpretation of a New Jersey statute.

The petitioners state in their brief that in *Hill* v. *Waterman*, 251 F. 2d 655 (3 Cir. 1958) the Court of Appeals decided that contributory negligence should be a defense to an action brought under the New Jersey Wrongful Death Act (P. br. 10, 26). However, this is entirely incorrect. The *Hill* case involved the Pennsylvania Wrongful Death Act which is entirely different from the New Jersey act in its wording. Furthermore the court in *per curiam* opinion in the *Hill* case cited two other cases in which it had interpreted the Pennsylvania act. Both of these cases had been decided prior to the *en banc* decision in the *Skovgaard* case, yet in the *Skovgaard* case the majority refused to pass on the question of the defense of contributory negligence before the court below made its factual findings.

In each case the court had dissimilar statutes before it with different decisions on construction of different state courts in interpreting those statutes. Consequently the majority recognized that *as a matter of interpretation of a state statute* the results may differ greatly when the statutes of different states are considered to supplement maritime law. The conclusion of petitioner's attorney that in the *Hill* case the court found that contributory negligence was a defense under the New Jersey Wrongful Death Act is in error. Since the Pennsylvania statute is completely different in wording from the New Jersey statute the conclusion cannot be supported.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. ss1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania statute does not not employ the "such as" test of the New Jersey statute

which incorporates the test of liability based on the rights of the deceased if he had lived.

POINT V

The evidence supported findings of both negligence and unseaworthiness and these issues were properly submitted to the jury.

There was ample evidence to support jury findings of both negligence and unseaworthiness. On the basis of the evidence, a good part of which was undisputed, the issues were properly submitted to the jury. *Schulz* v. *Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956); *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957); *Honeycutt* v. *Wabash Railway Co.*, 355 U. S. 424, 78 S. Ct. 393, —— L. Ed. —— (1958).

The defendant had an affirmative non-delegable duty to provide a reasonably safe place to work and a seaworthy vessel. This duty it failed to perform. The law relating to these duties was discussed.

The trial court in denying the motion for directed verdict made by the defendant at the close of the case, clearly summed up the evidence submitted (R. 145).

> "The Court: Your statement up to the last moment was all right as far as it went. In other words, you are recognizing that the ventilating system of the ship was inadequate to remove carbon tetrachloride, and I am sure that there is no point to argue or disagree with you that a ship perhaps ordinarily is not required to have a ventilating system that could remove a poison of that type which is rarely used. The moment that you specify carbon tetrachloride as the chemical to be used in cleaning the generator, and it was known that it was

a dangerous substance, then there was a duty certainly to see that the ventilating system was supplemented and aided by other methods of withdrawing the fumes, and that presents the basic question in the case, it seems to me. Whether the ventilating system both that which was part of the ship regularly and that which was brought in as auxiliary equipment constituted a sufficiently adequate system in order that the men might work there with reasonable safety.

I hold there is a question of fact for the jury to pass upon. Your motion is denied."

Judge Learned Hand in reviewing the evidence in this case stated (R. 148):

"* * *. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will 'remove all traces of dirt and film' (fol. 165), but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The 'blower' was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and 'vents' at the top of the engine-room through which air was drawn in. Thus,

means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the 'blower,' and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not 'adequate to remove the fumes.' The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision. * * * "

On the basis of the evidence the jury could have found that the defendant specified and ordered that carbon tetrachloride be used in the cleaning in the engine room of the vessel; that its engine room was a confined space and that the use of carbon tetrachloride in such an area without furnishing proper and adequate ventilating equipment was dangerous and would make the engine room an unsafe place to work. The jury could further have found from the evidence that the defendant knew or should have known that the ship's ventilating equipment was inadequate and would not make the engine room a safe place to work; that the defendant, by its officers was present when additional equipment was placed in the engine room and that they knew or should have known that this additional equipment was inadequate and would not make the engine room a safe place to work.

The jury could and did find that the defendant was negligent and that the vessel and its equipment was inadequate and unseaworthy.

The evidence discloses that carbon tetrachloride was specifically ordered by defendant to be used in the confined

engine room of the vessel (R. 73; R. 130; R. 146). Carbon tetrachloride is a dangerous chemical (R. 109; R. 116). It is five times heavier than air (R. 115). Taking into consideration the size of the engine room and the amount of carbon tetrachloride used during six hours, a concentration of at least 20,000 parts per million would be produced and be present if it were not properly removed by adequate ventilating equipment (R. 23; R. 24; R. 26; R. 27). A concentration of 50 to 100 parts per million units of weight per unit of volume was considered a safe concentration (R. 111). The concentration produced was at least 200 times the allowable safe concentration. Because of the weight of carbon tetrachloride, the greatest concentration would occur at the bottom of the confined engine room (R. 115). The full potential concentration was actually greater than 200 times the allowable safe concentration because there was machinery which occupied part of the space in the engine room and the concentration was greater at the bottom of the room where decedent worked. Proper ventilation would require ventilating ducts at floor level and there were none at that level in the engine room (R. 117). The auxiliary blower fan and air hose did not remove any vapors as to reduce the dangerous and unsafe concentration of carbon tetrachloride (R. 36). It was conceded by defendant's expert that the existing ventilation system of the engine room was inadequate to remove the accumulation of carbon tetrachloride vapors in the engine room caused by the use of carbon tetrachloride in the place as ordered by defendant (R. 144). The Chief Engineer of the vessel knew or should have known of the type and capacity of the ventilating system on his vessel. He knew that the deceased was going to work in the confined area of the engine room with carbon tetrachloride as ordered by the defendant and of the dangerous character of carbon tetrachloride when used in a confined space without adequate

ventilation (R. 75; R. 76). The Chief Engineer was not called to testify although he was still in the employ of defendant (R. 138).

The work which the deceased and his fellow employees were doing, was done in conjunction with the work of the ship's crew and it was done with the participation of and under the control of defendant's officers and agents (R. 75; R. 76; R. 96; R. 124; R. 125; R. 130; R. 146).

The carbon tetrachloride was used because it was specified by defendant by name (R. 96). There were safer substitutes for carbon tetrachloride which could have been used (R. 97).

Captain Haley had testified on deposition on cross-examination by his own attorney (R. 130):

> "Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.
>
> Q. Just briefly what did that consist of? A. That consisted of deck and engine work.
>
> Q. Repairs and overhaul? A. Repair and overhauls, yes.
>
> Q. Was that work done under your orders? A. No, sir.
>
> Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. Under the orders of the marine superintendent.
>
> Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct."

The crew had remained on board the vessel and it participated in the work going on. In fact the specifications provided with reference to the very generators on which deceased was working that "Crew to remove and replace 8 cylinder heads for the port and stabd. generators" (R. 146). The ventilators belonged to the ship (R. 8). The

blower belonged to Rodermond (R. 81). During the week the engine crew of the vessel worked on the diesel engines below decks (R. 75). The Chief Engineer was present on Friday when Doidge made preparations and put the blower in position to do the work on Saturday (R. 76; R. 82).

Mr. Doidge had testified (R. 96):

> "Q. And was the work being done under the supervision of the chief engineer, as far as the engine room was concerned? A. Oh, yes."

He also testified (R. 104):

> "Q. With reference to the work which you are doing, you knew, you told us, of the dangers of carbon tetrachloride, is that correct? A. That is correct.
>
> Q. And isn't it a fact that you spoke to the engineer of the vessel before you used it that Saturday? And did you talk to him about the danger of the carbon tetrachloride, the carbon tetrachloride? A. He knew about it.
>
> Q. You talked to him about it? A. Surely, That is the reason we wanted the ship cleared."

The full complement of engineers and engine room crew remained on board the vessel during the period it was at Rodermond (R. 124). They maintained the engines and did any other work that had to be taken care of (R. 125). At night the engineers usually slept on board (R. 125). We have already quoted the testimony of Captain Haley that the work on the vessel was done "under the orders of the marine superintendent," an employee of the defendant.

The defendant failed to produce its Chief Engineer who would know of the condition of the vessel, the engine room, the ventilators, and the arrangements made with Mr. Doidge for doing the carbon tetrachloride work on a Saturday. He was still in defendant's employ (R. 128). They failed to produce their Marine Superintendent who was still in their employ (R. 139). They failed to have Captain Haley

testify although he had been in court and plaintiff had read part of his testimony (R. 137). In short those witnesses who were in the best position to testify to the condition of the engine room, the ventilation system, and circumstances under which plaintiff performed his work were not produced. In *Chesapeake & Ohio Ry. Co.* v. *Richardson*, 116 F. 2d 860 (6 Cir. 1941), cert. den. 313 U. S. 574, 61 S. Ct. 961, 85 L. Ed. 1531 (1941), Judge Hamilton remarked at page 865:

> "* * * The unexplained failure of a party to produce a witness under such circumstances is a fit subject for fair comment and may justify an inference unfavorable to the party in default. * * *"

The defendant's expert testified that the ship's ventilating system was inadequate for carbon tetrachloride cleaning to be done in the vessel's engine room. He testified (R. 143):

> "Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room? A. In my opinion it was not.
>
> Q. And why do you say that, Mr. Finkenaur? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air."

The dangerous character of the carbon tetrachloride in the confined space of the engine room was established at the trial. Dr. Gaines testified (R. 116):

> "Q. What about the use of carbon tetrachloride in confined areas? Is that a safe or dangerous practice? A. In confined areas it is dangerous.
>
> The Court: What do you mean by 'confined areas'?

The Witness: Any room where you do not have ventilation where the vapors, when they do accumulate, will gradually come down to the level of the individual using it so that he can inhale them. In other words, the vapors of carbon tetrachloride cannot and do not escape from the room when it is being used."

The fact that the deceased died from carbon tetrachloride poisoning was also well established (R. 107; R. 142; R. 143). Dr. Gaines' testimony concerning the inadequacy of the ventilation, even with Rodermond blower and the gas masks was not substantially challenged. Plaintiff's attorney asked a lengthy hypothetical question involving all the pertinent evidence in the record. Defense counsel made an objection which was sustained. Then the court asked (R. 36):

"The Court: In other words, just referring to conditions in the engine room as they are outlined to you by counsel, do you have any opinion that you can express with reasonable certainty as to whether or not the ventilating system in that room was reasonably adequate in order to remove the fumes?

The Witness: I have an opinion.

The Court: And what is your opinion?

The Witness: My opinion is that it was not adequate.

The Court: All right, that is your opinion. That is all you want?

Mr. Baker: That's all."

CONCLUSION

The inadequacy of the ship's ventilation system for the use for which it was provided was not disputed. The knowledge of the officers of the vessel of the work to be done by the deceased and the place where it was to be done was not denied.

The defendant specifically ordered the use of a chemical in a confined area, which was highly dangerous. The ven-

tilating system and auxiliary equipment were not adequate for the work to be done; that is, spray cleaning with carbon tetrachloride. The defendant and its officers knew or should have known of the unsafe condition created by the inadequacy of the ventilating equipment. The evidence supported findings of negligence and unseaworthiness, which issues were presented to the jury under proper charges by the trial court.

Pursuant to the principles of law set forth in the majority opinion of the Court of Appeals written by Judge Learned Hand and discussed in this brief the verdict of the jury is sound both as to the law applied and the facts presented.

WHEREFORE plaintiff requests that the judgment of the Court of Appeals be affirmed with costs on this appeal.

Respectfully submitted,

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